Florida Department of

Memorandum **Environmental Protection**

To: Noah Valenstein, Secretary

From: Robert A. Williams, General Counsel

Date: September 17, 2018

Re: Florida's Assumption of the 404 Program: Endangered Species Act Review

Issue: The Department of Environmental Protection (Department), on behalf of the State of Florida, is developing a program and preparing the necessary documents to apply to the Environmental Protection Agency (EPA) to assume authority to administer the Clean Water Act Section 404 permitting program. In some cases, permits issued under this program could trigger the need to obtain Endangered Species Act (ESA) authorization. The following questions have been asked regarding the process for reviewing endangered and threatened species once Florida assumes the 404 permitting program:

I. Can a permittee under a state-assumed 404 permit program obtain ESA authorization as part of EPA's limited federal oversight of the state-assumed 404 program?

II. If so, does "agency action" under the ESA equate to "final agency action" under the federal Administrative Procedures Act?

Summary: Answering the first question, yes, Section 7 consultation is available as part of EPA oversight and is the best method to ensure 404 permit applications comply with the ESA. Section 7 consultation is therefore the Department's preferred option. EPA consultation with the United States Fish and Wildlife Service (FWS) under Section 7 of the ESA as part of its discretionary duty to review, comment, or object to permit applications that have been submitted under state-assumed 404 programs will help ensure that the permitted activities do not jeopardize the continued existence of listed species or adversely modify a species' critical habitat while maintaining a streamlined permitting process.

In sum the answer to the second question is, no. Federal regulations and courts have determined that these similar sounding terms apply in different circumstances and have two separate and distinct tests. Agency actions pursuant to the ESA do not necessarily rise to "final agency action" within the meaning of the Administrative Procedures Act.

Analysis:

I. Can a permittee under a state-assumed 404 permit program obtain ESA authorization as part of EPA's limited federal oversight of the state-assumed 404 program?

Based on the requirements of the ESA and the permitting process under Section 404 of the Clean Water Act, it is the Department's position that ESA review and consultation should be part of the EPA's federal oversight of state-assumed 404 permit applications. Conducting ESA review and

providing the necessary comments, objections or recommendations ensures that permitted activities do not jeopardize the continued existence of listed species or adversely modify a species' critical habitat while maintaining a streamlined permitting process.

A. When ESA Review is Required

The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. *See* 16 U.S.C. §1531(b). The ESA protects endangered and threatened species (listed species) and their habitats by prohibiting their "take" without the necessary authorization.[1] *See* 16 U.S.C. §1538. The ESA sets forth two mechanisms for applicants for a 404 permit to obtain take authorizations that may occur incidental to an otherwise lawfully permitted activity – a Section 7 incidental take statement and a Section 10 incidental take permit.[2] *See* 16 U.S.C. §1536 and 16 U.S.C. 1539. Both of these sections authorize limited jeopardization of endangered or threatened species and/or destruction or modification of their habitat. *See id.*

The Section 7 consultation process may authorize the incidental take of listed species arising out of any action *authorized, funded, or carried out* by a federal agency and is intended to ensure that such an action is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. *See* 16 USC §1536(a)(2). The ESA refers to these federal actions as "agency actions," however, as explained below the criteria to be an "agency action" under the ESA is different than the criteria to be a "final agency action" under the Administrative Procedures Act. The ESA implementing regulations broadly defines "action" as:

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

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[1] "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. *See* 16 U.S.C. 1532(19). This also includes significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. *See* 50 C.F.R. 17.3.

[2] Section 10 of the ESA may be used by landowners, including private citizens, corporations, Tribes, States, and counties who want to develop property inhabited by listed species. 16 U.S.C. § 1539. Landowners may receive a permit to take such species incidental to otherwise legal activities, provided they have developed an approved habitat conservation plan (HCP). *See id.* HCPs include an assessment of the likely impacts on the species from the proposed action, the steps that the permit holder will take to avoid, minimize, and mitigate the impacts, and the funding available to carry out the steps. *See id.*

50 C.F.R. §402.02; *see also Pac. Rivers Council v. Thomas*, 30 F. 3d 1050, 1054 (9th Cir. 1994) (finding that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA"). Additionally, Section 7 of the ESA only applies to "actions in which there is discretionary federal involvement or control." 50 C.F.R. 402.03. Thus, a two-part test has been developed to determine if a federal action is "agency action" under the ESA: (1) whether a federal action affirmatively authorized, funded, or carried out the under lying activity; and (2) whether the agency had some discretion to influence or change the activity for the benefit of a protected species. *See Karuk Tribe of Cal. V. United States Forest Serv.*, 681 F. 3d 1006, 1021 (9th Cir. 2012).

Federal agencies are required to engage in consultation with either FWS or NMFS whenever: there is a reason to believe a listed species is present in the area affected by a federal action; and implementation of the action "may affect" the species or its critical habitat. *See* 16 U.S.C. §1536(a)(3); 50 C.F.R. 402.14(a). Section 7 consultations may be informal or formal. Informal consultations provide an opportunity to explore ways to modify the action to reduce or remove adverse effects to the listed species or critical habitat. Informal consultation concludes when a determination of "no effect" is made, when the FWS concurs with a "not likely to adversely affect" determination, or when formal consultation is otherwise initiated. The formal consultation is a process in which the FWS assesses the action's potential to jeopardize the listed species, to result in the destruction or adverse modification of critical habitat, or to result in incidental take of a listed species. Once a formal Section 7 consultation is complete, the FWS will publish a "biological opinion" (BiOp) and incidental take statement (ITS) that includes "reasonable and prudent alternatives" about how the proposed action could be modified to avoid jeopardy. The BiOp and ITS provide applicants liability protection from claims arising under the ESA (e.g., an unauthorized take) if the action proceeds in compliance with the terms and condition of the ITS. *See* 50 C.F.R. 402.14(i)(v)(5); 15 U.S.C. 1536(o)(2).

B. EPA's Oversight of State-Assumed 404 Programs Satisfies the Agency Action Test Under the ESA

Under Section 404 of the Clean Water Act, limited federal oversight authority is retained by EPA even after a state has assumed the 404 program and permitting control. *See* 33 U.S.C. §1344(j). Under this oversight, unless waived by EPA, the state is required to present to EPA copies of all permit applications which are submitted to the state for approval and the EPA must provide copies of those applications to the Army Corps of Engineers, Department of Interior and United States Fish and Wildlife. *See* 40 C.F.R. 233.50(b). The EPA cannot waive review of discharges with a reasonable potential for affecting endangered or threatened species as determined by FWS. *See* 40 C.F.R. 233.51(b)(2). EPA's "decision to comment, object, or to require permit conditions" is based on the input from the commenting agencies and its own independent review. *See id.* The EPA must notify the state of any comments, objections, or recommendations, and the reasons for such, and the actions that must be taken by the State in order to eliminate any objections. *See id.*

Any comment, objection or recommendation must be based on the EPA's determination that the proposed permit does not comply with the requirements of the Clean Water Act and/or other

implementing federal regulations, such as the 404(b)(1) guidelines, and include considerations of impacts to endangered or threatened species under the Endangered Species Act. *See* 40 C.F.R. 233.50(b); 40 C.F.R. 230.10(b)(3) (prohibiting the discharge of dredged of fill material if it "jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973," or "results in likelihood of destruction or adverse modification of [critical] habitat"); 40 C.F.R. 233.75 (requiring the minimization of adverse impacts to plants and animals by "avoiding sites having unique habitat or other value, including habitat of threatened or endangered species"); 40 C.F.R. 233.93 (requiring compensatory mitigation to consider threatened and endangered species). When the State has received an EPA objection or requirement for a permit condition to the proposed permit, the State cannot issue the permit unless it takes the steps required by the EPA to eliminate the objection or the EPA withdraws the objection. 40 C.F.R. 233.50(f), 233.50(h)(2).

Given that "agency action" under the ESA is to be interpreted broadly, EPA's oversight role over state-assumed permit applications meets the two-part test to deem EPA's actions as federal "agency action" under the ESA. Part one of that test requires a federal action that affirmatively authorized, funded, or carried out the under lying activity. *See Karuk*, 681 F. 3d 1006. That part of the test is satisfied by EPA's affirmative decision on whether it will "comment, object or require permit conditions" to a permit application that has the reasonable potential to affect listed species. If EPA determines that the proposed project will not affect listed species or critical habitat, then no further analysis is required. *See* 50 C.F.R. 402.12. Part two of the test requires that the agency had some discretion to influence or change the activity for the benefit of a protected species. *Id.* This second part of the test is also met. EPA can require that the state issue the permit with permit conditions that would protect listed species or may object to the states issuance of the permit thereby prohibiting the activity.

C. Conclusion

Given EPA's general oversight responsibility to review permit applications from state assumed 404 programs and its inability to waive the review of permit applications that have the potential to impact endangered and threatened species it is reasonable to interpret its oversight role as federal "agency action" under Section 7 of the ESA and therefore triggering the need for consultation with FWS. From a public policy standpoint, utilizing a procedure where EPA conducts the required Section 7 consultation with the FWS as part of its oversight duty provides benefits to both the environment and to the permit applicants by ensuring for the protection of endangered and threatened species while providing permit applicants with a streamlined process that provides the necessary certainty that if they comply with their authorizations they will limit their liability.

II. Does "agency action" under the ESA equate to "final agency action" under the federal Administrative Procedures Act?

As described above "agency action" under the ESA is specifically defined and been given a two-part test by the courts. In contrast, "final agency action" under the federal Administrative

Procedures Act is determined by a separate two prong test. An action by a federal agency is considered "final agency action" when the action: (1) marks the consummation of the agency's decision making process, not merely tentative or interlocutory; and (2) determines rights or obligations or an action from which legal consequences will flow. *See Bennet v. Spear*, 520 U.S. 154, 177-78 (1992).

EPA's comments, objections and recommendations on permit applications submitted to an assumed state program do not meet either prong of this test. *See Marquette Cty. Rd. Comm'n v. United States EPA*, 188 F. Supp. 3d 641 (W.D. Mich. 2016).[3] First, EPA's comments, objections or recommendations do not mark the consummation of the decision-making process. As the court reasoned in *Marquette Cty,* EPA's comments, objections or recommendations are not final because afterwards it "could decide to withdraw the objections or accept a modified permit." *See id.* Second EPA's comments, objections or recommendations do not determine the rights or obligations of the applicant nor are they action from which legal consequences flow as the state must decide what action to take based on EPA's comments, objections or recommendations or if the state fails to act the applicant can seek a permit from the Corps. *See id* at 648.

Therefore, even if EPA's oversight role is considered agency action for purposes of the ESA, it would not be considered final agency action under the federal Administrative Procedures Act.

[3] The Sixth Circuit affirmed the District Court in an unpublished opinion, No. 17-1154, 18a0145n.06. The Sixth Circuit engaged in an analysis of 'agency action" with respect to the Federal APA and concluded that the EPA's actions did not constitute final agency action and were therefore not reviewable.